IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ELOISA MARQUEZ, RICHARD MARTINEZ, DESTINEY MARTINEZ and ANDRELLITA MARTINEZ,

1:15cv00787KBM LF

Plaintiffs,

vs.

OFFICER NICHOLAS LEVINE, in his official capacity as a commissioned law enforcement officer and individual capacity, OFFICER RYAN KUEHL, in his official capacity as a commissioned law enforcement officer and individual capacity, and the NEW MEXICO STATE POLICE DEPARTMENT,

Defendants.

UNOPPOSED MOTION FOR AN ORDER APPOINTING A GUARDIAN AD LITEM

COMES NOW Plaintiff Richard Martinez, by and through his counsel, and pursuant to Federal Rule of Civil Procedure 17(c)(2) respectfully moves this Court for the appointment of a limited Guardian ad Litem and as grounds states as follows:

1. The purpose of Fed. R. Civ. Pro. 17(c) is to protect an incompetent person's interests in prosecuting or defending a lawsuit. *Davis v. Walker,* D.C. No. 2:10-CV-02139 (January 16, 2014, 9th Cir.) citing *Gardner ex rel. Gardner v. Parson*, 874 F.2d 131, 140 (3d Cir. 1989).

2. Although Rule 17 does not make appointment of a GAL mandatory, it does impose a legal duty on the Court to consider whether an incompetent litigant is adequately protected and if not, to craft an appropriate remedy. *Id.*, Fed. R. Civ. Proc.

17; See also, *Hull v. Hull*, 53 F.3d 1125 (10th Cir. 1995).

3. Plaintiff Richard Martinez was evaluated and adjudicated in 2012 as mentally retarded, by law, in state district court due to his inability to understand legal proceedings or to assist his counsel.

4. As a result of his limited cognition and his inability to read at an adult level, Mr. Martinez is also unable to adequately assist his counsel in this federal court litigation.

5. Accordingly, Mr. Martinez is in need of a limited Guardian ad Litem for the purpose of representing his best interests at the scheduled mediation conference, for assisting him in reading, understanding and approving or rejecting written documents, and if this matter does not resolve, for the duration of this case.

6. Due to the indigency of Mr. Martinez, his counsel seeks the Court's appointment of a limited Guardian ad Litem. After consulting with various disability advocacy organizations and the State Bar of New Mexico's Volunteer Legal Services, and finding no qualified attorney willing or able to serve on a pro-bono basis, counsel identified the following attorney who is available to act as Plaintiff Richard Martinez's limited Guardian ad Litem:

Nancy Simmons, Esq.
Law Office of Nancy L. Simmons, P.C.
120 Girard Blvd SE
Albuquerque, New Mexico 87106-2228
nlsimmons@swop.com
T: (505) 232-2575
F: (505) 232-2574

7. Attorney Simmons has extensive civil and criminal litigation experience and has previously served as a guardian ad litem for minimally capacitated persons. She has agreed, if appointed, to accept the task.

8. Counsel for Defendants have been contacted regarding their opposition/ non-opposition to this Motion and do not oppose the form of the motion or proposed order. Despite receiving a copy of the state court forensic expert's report regarding the cognitive capacity of Richard Martinez, Defendants do not stipulate to the alleged incapacity of Plaintiff Richard Martinez, reserve their right to challenge that alleged incapacity, if and as necessary, in their defense of this case, and do not stipulate to the relevance, if any, of that alleged incapacity, as to the parties' claims or defenses in this matter.

WHEREFORE Plaintiff Richard Martinez asks that the Court enter an immediate Order appointing Nancy Simmons as Guardian ad Litem for Plaintiff Richard Martinez to represent Richard Martinez in the above captioned proceeding, with all the necessary powers and duties of a Guardian ad Litem, and that Nancy Simmons, Esq. be allowed to serve as an arm of the Court for all duties she will perform on behalf of Mr. Martinez and the Court, with all the immunities for a Guardian ad Litem serving in such a position.

RESPECTFULLY,

/s/Pilar Tirado Murray
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